equity in charging an insurer who has been so induced to assume the risk. See *Blenke v. Citizen's Life Ins. Co.* (1911) 145 Ky. 332, 342, 140 S. W. 561, 565.

INTERSTATE COMMERCE—STATE CONTROL OF ANIMALS FERAE NATURAE.—The Alabama Shrimp Act made it unlawful to transport by water shrimp, taken from the waters of the state, beyond the state boundary, unless the usual price paid at the place to which they were transported was higher than that paid within the state; imposed a tax on shrimp so transported; and prohibited any person, who had not for more than a year been a *bona fide* resident of the state, from catching shrimp for shipment out of the state by water. Gen. Acts, 1919, secs. 8, 12. The plaintiff, who was engaged in the shrimp packing business in Mississippi, brought suit to enjoin the enforcement of this act. *Held*, that these regulations were void as in violation of the commerce clause of the United States Constitution. *Elmer v. Wallace* (1921, N. D. Ala.) 275 Fed. 86.

Shrimp, with fish in general, may properly be classified as animals *ferae naturae*. *Gratz v. McKee* (1919, C. C. A. 8th) 258 Fed. 335; *State v. Adams* (1920) 142 Ark. 411, 218 S. W. 845. In so far as there can be property in fish in streams, title is in the state with an exclusive power of control. *State v. Blanchard* (1920) 96 Or. 79, 189 Pac. 421; *Gratz v. McKee* (1920, C. C. A. 8th) 270 Fed. 713; *State v. Hume* (1908) 52 Or. 1, 95 Pac. 808; *Commonwealth v. Cosick* (1910) 19 Pa. Dist. R. 309. Even migratory fish in interstate navigable streams or in coast waters are subject to exclusive state regulation while within the state boundaries. Gould, *Waters* (3d ed. 1900) par. 38; *State v. McCullagh* (1915) 96 Kan. 786, 153 Pac. 557. Although the fish, after being caught, are to be transported beyond state limits, Congress may not, under the guise of interstate commerce, regulate the catching of them. *Geer v. Connecticut* (1895) 161 U. S. 519, 16 Sup. Ct. 600. Such legislation is within the proper police power of the state, although it results in harm to the fishing industry in neighboring states. *Union Packing Co. v. Shoemaker* (1921) 98 Or. 659, 194 Pac. 854. Nor is this power of control terminated by the capture and reduction to possession of an animal *ferae naturae*. The state may follow wild game into the hands of an individual so as to prohibit its coming under federal interstate commerce regulation. *United States v. McCullagh* (1915, D. C. Kan.) 221 Fed. 288. It is to be noticed in all of these cases, where statutes similar to the instant act have been upheld, that their primary purpose was to preserve wild game for the benefit of the citizens of the state. But when the statute has no protective purposes, either as to animals or citizens, and is designed to discriminate against the industries of neighboring states by preventing shipments out of the state except on arbitrary conditions as to price, etc., the police power seems to have been abused at the expense of federal control over interstate commerce. Cf. *State v. Savage* (1919) 96 Or. 53, 184 Pac. 567.

MANDAMUS—WHEN ISSUABLE—DISCRETION OF CITY COUNCIL.—Under New York statutes a bus owner is required to obtain the consent of the local authorities as well as that of the State Public Service Commission before he is privileged to operate. Laws, 1915, ch. 667; 1919, ch. 307. The city council of Newburgh, after a hearing, denied such consent to the relator upon the grounds that his bus line was not a public necessity or for the best interest of the city, whereupon an action was brought to compel the city council by mandamus to grant such consent. *Held*, that the writ should be granted. *People, ex rel. Aber, v. Leonard* (1921, N. Y. Sup. Ct.) 116 Misc. 591.

That city councils are amenable to the writ of mandamus as are others upon whom public duties are imposed is unquestionable. *State v. Mayor and Council of Madison* (1919) 170 Wis. 133, 174 N. W. 471; *Harman v. City of Parsons*

(1917) 81 W. Va. 197, 94 S. E. 135; *Huey v. Waldrop* (1904) 141 Ala. 318, 37 So. 380. But it is well settled that the mandamus is not a proper remedy for the enforcement of duties which involve the exercise of discretion or to control such discretion, unless it has been abused. *Cruise & Smiley Co. v. Town Council of Lincoln* (1920) 42 R. I. 408, 108 Atl. 419; *McIntyre v. Murphy* (1919) 177 N. C. 300, 98 S. E. 820; *People v. State Racing Com.* (1907) 190 N. Y. 31, 82 N. E. 723. The writ has been issued to set the exercise of discretion in motion. *State v. Board of Comrs.* (1913) 180 Ala. 489, 61 So. 368; *Richmond County v. Steed* (1920) 150 Ga. 229, 103 S. E. 253. When, however, the discretion has been honestly and not capriciously or arbitrarily exercised, it is conclusive. *Robinson v. Otis* (1916) 30 Calif. App. 769, 159 Pac. 441; *Pearl River Bank v. Town of Picayune* (1921, Miss.) 89 So. 9. The granting of licenses for the conduct of particular businesses or occupations is usually regarded as a discretionary power and thus not enforceable by mandamus. High, *Extraordinary Legal Remedies* (3d ed. 1896) ch. 5, sec. 327; *Armstrong v. Murphy* (1901) 65 App. Div. 123, 72 N. Y. Supp. 473. But its issuance may be made mandatory by statute. *State v. City of Grafton* (1920, W. Va) 104 S. E. 487; *In re O'Rourke* (1894, Sup. Ct.) 9 Misc. 564, 30 N. Y. Supp. 375. The courts are agreed that the complainant's legal right must be clear to entitle him to the writ of mandamus. 2 Spelling. *Injunctions and Extraordinary Remedies* (2d ed. 1901) ch. 40, sec. 1370; *People v. Board of Education* (1921, Sup. Ct.) 188 N. Y. Supp. 686; *People v. Walker* (1920, Sup. Ct.) 113 Misc. 592, 184 N. Y. Supp. 879. In the instant case it is by no means clear that the city was under any duty to give its consent to the relator's operation of his bus line. It is equally doubtful whether the legislature intended to restrict the powers of regulation and control delegated to local authorities to the limits the opinion suggests. See COMMENTS (1921) 31 YALE LAW JOURNAL, 183. The case seems unsustainable.

NEGLIGENCE—DEGREES OF NEGLIGENCE.—In an action for damages for injuries sustained as a result of the alleged negligent and wanton acts of the defendant, the latter pleaded contributory negligence as a defence. The trial court in instructing the jury failed to distinguish between negligence (whether slight, ordinary, or gross) and wanton acts involving the element of the defendant's knowledge of the plaintiff's danger and a conscious indifference to the consequences of his acts. *Held,* that the instruction was erroneous. *Payne v. Vance* (1921, Ohio) 133 N. E. 85.

In the earlier cases, the courts attempted to divide negligence into three degrees, slight, ordinary, and gross. *Brand v. Schenectady & Troy Ry.* (1850, N. Y.) 8 Barb. 368; *Union Pacific Ry. v. Henry* (1887) 36 Kans. 565, 14 Pac. 1. Where negligence without reference to the degree is the basis of the right to recover, such distinctions can only be a source of confusion. As has well been said, "gross" negligence is nothing more than negligence with a vituperative epithet. *Wilson v. Brett* (1843, Exch.) 11 M. & W. 113, 116. The modern American cases have shown a strong tendency to reject the doctrine that negligence is capable of division into degrees, and hold in effect that although the *amount* of care to be exercised varies with the circumstances, the *degree* remains the same, namely, appropriate care under the circumstances. *Milwaukee etc. Ry. v. Arms* (1875) 91 U. S. 489; *Young v. St. Louis etc. Ry.* (1910) 227 Mo. 307, 127 S. W. 19; *Denny v. Chicago etc. Ry.* (1911) 150 Iowa, 460, 130 N. W. 363. It is essential, however, to distinguish negligence from reckless or wanton conduct, for in cases involving the latter, contributory negligence is no defence and punitive damages may be awarded. *Crosman v. Southern Pac. Co.* (1921, Nev.) 194 Pac. 839; *Pullman Co. v. Pulliam* (1920) 187 Ky. 213, 218 S. W. 1005. One is guilty of reckless or wanton conduct if he exhibits an entire absence of care for life,